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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

Implementation of Section 255 of
the Telecommunications Act of 1996

Access to Telecommunications Services,
Telecommunications Equipment, and
Customer Premises Equipment
By Persons With Disabilities

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) WT Docket 96-198
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REPLY COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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**REPLY COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association,¹ by its attorneys, submits its Reply Comments in the above-captioned proceeding.²

INTRODUCTION AND SUMMARY

The comments submitted in this proceeding reflect the thoughtful analysis of a diverse set of interests, including the manufacturing and service provider community as well as advocates

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including 48 of the 50 largest cellular, broadband personal communications service ("PCS"), enhanced specialized mobile radio, and mobile satellite service providers. CTIA represents more broadband PCS carriers, and more cellular carriers, than any other trade association.

² Implementation of Section 255 of the Telecommunications Act of 1996: Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment By Persons With Disabilities, Notice of Inquiry in WT Docket 96-198, FCC 96-382 (released September 19, 1996) ("Notice").

for persons with disabilities. Were it not for Congress' clear expression of intent, the Commission and the Access Board would likely be facing the unenviable task of sorting out and weighing these important, sometimes diverging, interests. Fortunately, Congress in enacting Section 255 spoke clearly, and in a manner reflecting its confidence that competitive solutions should be primarily relied upon to achieve accessibility, not government fiat.

In its comments, CTIA recommended that the Commission, in fulfilling its obligations under Section 255 adopt a non-binding policy statement or set of voluntary guidelines to clarify the obligations of service providers under Section 255. This approach also would provide maximum flexibility to equipment and service providers in deploying technologies that are capable of providing the highest degree of access and use by persons with disabilities. On reply, CTIA addresses the following issues:

- to ensure continued industry dynamism currently prevalent in the mobile service market, voluntary guidelines should be adopted as opposed to formal rules;
- the Commission must implement Congress' clear intention to limit the ability of individuals to file complaints for violations of Section 255;
- contrary to several commenters' blanket assertions, wireless phone technology is currently accessible to persons with disabilities. Moreover, the CMRS industry is specifically addressing concrete ways to increase accessibility; and
- the Commission and the Access Board, as appropriate, should retain the focused definition of "disability" contemplated by Congress.

By such action, the Commission will ensure that Section 255 is implemented in a manner which provides subject carriers and manufacturers with maximum flexibility, consistent with Congress' objectives.

I. VOLUNTARY GUIDELINES WILL ENSURE ACCESSIBILITY AS WELL AS PRESERVE INDUSTRY DYNAMISM, CONSISTENT WITH CONGRESSIONAL INTENT.

The Telecommunications Act of 1996 ("1996 Act") is predicated upon the view that competition, consumer demand, and technology advances will better secure consumer welfare in telecommunications than traditional regulatory intervention and oversight. There is every reason to believe that the needs of persons with disabilities will be met by industry and market forces. That is why Congress directed the adoption of access "guidelines" based upon "readily achievable" solutions, guidelines that are to be adjusted periodically as circumstances change.³

Several commenters advocate the adoption of Commission rules instead of voluntary guidelines, as mandated by Congress. They contend that Section 255 requires that the Commission take a leadership role by adopting concrete standards and rules.⁴

³ The Architectural and Transportation Barriers Compliance Board ("Access Board") is specifically required to "develop guidelines for accessibility of telecommunications equipment and customer premises equipment in conjunction with the Commission." 47 U.S.C. § 255(e). Moreover, the Access Board must "review and update the [telecommunications equipment and CPE access] guidelines periodically." *Id.*

⁴ See, e.g., Consortium for Citizens with Disabilities ("CCD") comments at 4 (citing hearing aid compatibility, telecommunications relay services and decoder encryption rule making proceedings as examples where the Commission

Simply stated, commenters provide no legal justification for the adoption of rules as opposed to voluntary guidelines. The Commission should therefore reject their suggested approach.

Congress favored a flexible regulatory approach i.e., voluntary guidelines, for good reason. The rule making process is simply too cumbersome and time-consuming to properly address all issues surrounding access by persons with disabilities. The communications manufacturing and service industries are experiencing extraordinarily rapid technological change. This is particularly true for CMRS providers and equipment manufacturers, that are adopting digital technology, employing new frequency bands, implementing new system architectures, and devising and marketing new vertical features. This dynamic growth coupled with the wide variety of service providers -- wireline and wireless; narrowband and broadband; fixed and mobile -- make clear why the Commission should refrain from attempting to prescribe the manner in which telecommunications firms meet the diverse needs of individuals with disabilities. By the time the Commission completed the rule making process, a new set of advances would be made, thus rendering obsolete many of the adopted rules.

provided leadership through the rule making process); The National Association of the Deaf ("NAD") comments at 3-10; Self Help for Hard of Hearing People ("SHHH") comments at 2; Protection and Advocacy Program - University Legal Services comments at 2-4; American Speech-Language-Hearing Association comments.

II. THE ACT FORECLOSURES PRIVATE RIGHTS OF ACTION UNDER SECTION 255.

Several commenters also maintain that the Commission should adopt complaint procedures which ensure that private parties have the right to file complaints either with the Commission or a court seeking damages and/or for non-compliance with Section 255.⁵ Congress made it clear, though, that private rights of action are prohibited. Well settled administrative law principles require that the Commission refrain from broadening Congress' intent when the statute is clear and unambiguous.⁶ For this reason, commenters' requests for an expanded interpretation are foreclosed.

As expressly provided in Section 255:

[n]othing in this section shall be construed to authorize any private right of action to enforce any requirement of this section or any regulation thereunder. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.⁷

This subsection imposes two significant limitations on the complaint process. First, the Commission's "exclusive jurisdiction with respect to" Section 255 complaints⁸ creates government, and not private, rights of action. That is, any

⁵ See, e.g., CCD comments at 16; Jo Waldron comments at 21-22; NAD comments at 32-34.

⁶ Chevron, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter . . . the agency [] must give effect to the unambiguously expressed intent of Congress.").

⁷ 47 U.S.C. § 255(f).

⁸ Id.

reservation of government policy formulation and compliance lies with the Commission and other expert government agencies in lieu of the ad hoc determinations flowing from private litigation. Second, any available remedies must be sought solely through the Communications Act, thus requiring a federal, not a state forum. This means that resort to state or federal courts as an initial matter is foreclosed in favor of filing a complaint before the Commission.

Nothing in the legislative history requires a different result. The Conference Report explicitly states that private rights of action are foreclosed and that resort to the Communications Act is the sole remedy.⁹ No statutorily-based argument has been or can be raised which points to a contrary conclusion.¹⁰ In this situation, reliance upon Congress' clear expression is the only legally permissible conclusion.

⁹ See H.R. Conf. Rep. No. 230, 104th Cong., 2d Sess. 135 (1996) ("Section 249(d) [of the House Amendment] prohibits private rights of action, and mandates that all remedies are available only through the Communications Act. . . . In addition, the conferees adopted the provision of section 249(d) of the House amendment, which states that nothing in this section authorizes any private rights of action. The remedies available under the Communications Act, including the provisions of sections 207 and 208, are available to enforce compliance with the provisions of section 255.") ("Conference Report").

¹⁰ Contrary to NAD's claim, at bare minimum, the Conference Report reference to Section 207 remedies must be construed to prohibit private parties from seeking recovery of damages under Section 207 in a U.S. District Court. NAD comments at 32-33. The terms of Section 255(f) are clear. "The Commission shall have exclusive jurisdiction with respect to any complaint under this section" and no "private right[s] of action" are authorized. 47 U.S.C. 255(f) (emphasis added).

III. AS A FACTUAL MATTER, WIRELESS PHONES ARE INCREASINGLY ACCESSIBLE TO PERSONS WITH DISABILITIES.

Several commenters make blanket assertions that individuals with disabilities do not have unfettered access to wireless telephones.¹¹ Contrary to these claims, wireless technology is accessible today, and efforts at remedying remaining technical problems are well underway.

As CTIA noted in its comments,¹² many wireless carriers have individually taken steps to improve the ability of hearing aid users to utilize wireless phones. The comments evidence other examples of improving accessibility and accommodation. For example, AT&T demonstrates, contrary to blanket assertions, that there are many different technological solutions to address hearing loss today. It notes that

customers with mild hearing loss may select a wireless phone with enhanced volume capabilities, while customers who wear a hearing aid may instead select an inductively coupled telephone. Individuals with more severe degrees of hearing loss could select from among wireless telephones that have an external audio jack for hearing aid/telephone interconnection, or that use vibration rather than ringing to alert the user to an incoming call. Additionally many wireless telephones can be acoustically coupled to TT devices for use by persons with various degrees of hearing and/or speech disabilities.¹³

In addition to the individual efforts of wireless carriers to increase access to subscribers, CTIA through its members, is

¹¹ See Consumer Action Network at 8; SHHH at 7-8 (wireless phones are not yet accessible to many people who wear hearing aids.)

¹² See CTIA Comments at n.3 and 10-12.

¹³ AT&T comments at n.15.

currently sponsoring research at the University of Oklahoma, Center for the Study of Wireless Electromagnetic Compatibility ("Center"), to conduct research and propose solutions that would increase wireless access to hearing aid users. The Center is chartered to work with the industry and government to investigate and resolve interaction issues between wireless phones and other electronic devices, including hearing aids.¹⁴ Phase I of the research was recently completed in the Spring of 1996, and results were presented to representatives of hearing aid user groups, wireless service providers and manufacturers, hearing aid manufacturers, and the Commission. Soon to be completed Phase II of the research involves increased testing, leading to the development of voluntary standards for hearing aid immunity and phone emissions, culminating in real, usable solutions.¹⁵

IV. THE DEFINITION OF "DISABILITY" SHOULD BE FOCUSED, CONSISTENT WITH CONGRESS' INTENTIONS.

In the Notice, the Commission sought comments concerning the application of the definition of "disability" as defined by Congress in Section 255(a)(1). In doing so, the Commission recognized that the definition was limited to "principally cover individuals with functional limitations of hearing, vision,

¹⁴ This study is the most comprehensive scientific effort to date to involve a diverse group of hearing aid users to determine the degree of interaction between hearing aids and wireless phones.

¹⁵ Phase II research is expected to be completed by January, 1997. When completed, the study will have evaluated most North American digital phone technologies and types of hearing aids.

movement, manipulation, speech, or interpretation of information."¹⁶ Specifically, the Commission requested information that would illuminate the application of the ADA terms to the 1996 Act.

In response to the Commission's Notice, several parties seek to expand the definition beyond those disabilities expressly addressed by Congress. For example, the Consortium for Citizens with Disabilities requests that the Commission adopt a definition that would cover a broad range of disabilities, including individuals who are disabled based on their physical appearance.¹⁷

Here, Congress has clearly stated the types of disabilities it sought to include in the definition, and the Commission's rules should be consistent with that intent. To the extent that a disability was not contemplated by Congress, any requirements to meet the needs of those persons must still comply with all other provisions of the statute. In other words, where the Commission seeks to expand the burdens placed upon manufacturers

¹⁶ Notice at ¶ 13 (citing S.Rep. No.23, 104th Cong., 1st Sess. 52 (1995)).

¹⁷ CCD comments at 9 (the definition should include individuals, "with facial or other physical anomalies . . . Persons with unusual heights, weights, variegated or unusual melanin or other atypical skin pigmentation."). CCD also would have the Commission incorporate discrimination standards into the Section 255 process. See also American Speech-Language-Hearing Association comments at 2; CCD comments at 7 (the FCC should specifically address speech disability in its proceedings).

and telecommunications service providers, it must be sure that those requirements are indeed readily achievable.¹⁸

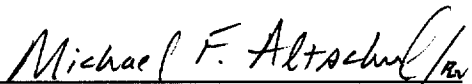
¹⁸ Several parties seek to broaden the definition of customer premises equipment (CPE) beyond Congress' current definition. See CCD comments at 14; NAD comments at 32 (the Commission should incorporate into the definition of CPE the definition of assistive technology device: "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.") (citation omitted); see also Arkenstone comments at 5; Massachusetts Assistive Technology Partnership Center at 1-2 (all products that function with telecommunications services, even if not primarily for use with telecommunications services, should be included in the CPE definition.) The Commission should reject these propositions as being beyond the mandate established by Congress.

CONCLUSION

For these reasons, CTIA respectfully requests that the Commission develop, with the assistance of the Access Board where applicable, a non-binding policy statement or set of voluntary guidelines which provide maximum flexibility to equipment and service providers to meet the needs of persons with disabilities. Consistent with Congress' express intent, the Commission should foreclose private rights of action under Section 255.

Respectfully submitted,

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